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NO. 87-2014

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

JAMES A. RHINEBARGER, MICHAEL L. PERSHING, J. KEITH GILL, and STEVEN W. ROMACK, On behalf of themselves and all others similarly situated,

*Petitioners,*

vs.

ROBERT D. ORR, Governor, State of Indiana; THOMAS A. BEASLEY, Director of Indiana State Police Personnel Department; State of Indiana; and, INDIANA STATE POLICE DEPARTMENT,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTION PRESENTED

Whether the 1985 Amendments to the Fair Labor Standards Act, Pub. L. No. 99-150, are unconstitutional.

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ROBERT D. ORR, Governor, State of Indiana; THOMAS A. BEASLEY, Director of Indiana State Police Personnel Department; State of Indiana; and, INDIANA STATE POLICE DEPARTMENT,

*Respondents*.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents Robert D. Orr, Governor of Indiana; Thomas Beasley, Director of State Personnel; the State of Indiana; and the Indiana State Police, respectfully pray this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), thereby refusing to review the decision entered March 8, 1988 in *Rhinebarger v. Orr*, 839 F.2d 387 (7th Cir. 1988).

## STATUTORY PROVISIONS INVOLVED

Petitioners correctly cite the only statutory provision applicable to this case, the Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150 § 2(c)(1), 99 Stat. 788, 29 U.S.C. § 216, which provides:

> No State, political subdivision of a State, or interstate governmental agency shall be liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6 (in the case of a territory or possession of the United States), 7, or 11(c) (as it relates to section 7) of such Act occurring before April 15, 1986, with respect to any employee of the State, political subdivision, or agency who would not have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in sections 775.2 and 775.4 of title 29 of the Codes of Federal Regulations.

## STATEMENT OF THE CASE

Petitioners, a group of Indiana State Police officers, filed this action seeking payment for allegedly compensable overtime. Petitioners sought summary judgment on the issue of liability. Respondents replied with their own motion for summary judgment. The District Court entered judgment for Respondents. See *Rhinebarger v. Orr*, 657 F.Supp. 1113 (S.D. Ind. 1987). On appeal the Seventh Circuit affirmed. See *Rhinebarger v. Orr*, 839 F.2d 387 (7th Cir. 1988). Both courts found the Fair Labor Standards Act Amendments of 1985 constitutional and dispositive.

## REASONS FOR DISALLOWANCE OF THE WRIT

### I.

### The 1985 FLSA Amendments Are Constitutional

This Court's reversal of *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465 (1976) that occurred with *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528,

105 S.Ct. 1005 (1985) is at the center of this litigation. This revived application of the FLSA, 29 U.S.C. § 201 *et seq.*, to public employment obviously caught state and municipal employers by surprise, and created the potential for massive liability overnight.

In direct response, Congress enacted a set of amendments to the FLSA which modified applicability of the overtime provisions to certain types of employment, and, of direct impact to the case at bar, a "grace period" for implementation. See Pub. L. No. 99-150 § 2(c)(1), 99 Stat. 788. Stated succinctly, the FLSA would not be applicable to Indiana State Troopers until April 15, 1986.

The Seventh Circuit correctly applied *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709 (1984) and found the enactment constitutional. For purposes of due process under the Fifth Amendment, it is necessary to show simply that the congressional enactment is "justified by a rational legislative purpose", *R.A. Gray*, 104 S.Ct. at 2718. This Court has traditionally been reluctant to overturn retroactive statutes "confined to short and limited periods required by the practicalities of producing national legislation", *R.A. Gray*, 104 S.Ct. at 2719, quoting *United States v. Darusmont*, 449 U.S. 292, 296-297, 101 S.Ct. 549, 551-552 (1981).[1]

It is nearly impossible to conceive a more rational congressional purpose than the legislative response sparked by this Court's latest reversal on FLSA application to state employment. A brief grace period normally precedes full application of statutes.

Indeed, the congressional response to *Garcia* followed the precedent established with the Portal-to-Portal Act, 29 U.S.C. § 251 *et seq*. Those amendments to the FLSA, enacted specifi-

[1] The period covered by this case is even narrower than the grace period permitted by the 1985 FLSA amendments. The complaint in this action sought damages for a period beginning February 19, 1985 and ending October 6, 1985. Respondents were able to modify their employment system some six (6) months prior to the congressional deadline.

cally in response to surprising judicial holdings and also retrospectively applied to accrued "liability", were uniformly found to be constitutional. See *Steiner v. Mitchell*, 350 U.S. 247, 76 S.Ct. 330 (1956); *Busch v. Wright Aeronautical Corp.*, 174 F.2d 322 (6th Cir. 1949); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2nd Cir. 1948), certiorari denied, 335 U.S. 887; *Rogers Cartage Co. v. Reynolds*, 166 F.2d 317 (6th Cir. 1948); and *Manosky v. Bethlehem-Hingham Shipyard*, 177 F.2d 529 (1st Cir. 1949).

Both the Seventh Circuit and the District Court, following developing caselaw, have correctly determined that the 1985 Amendments to the FLSA are constitutional. See *Kartevold v. Spokane County Fire Protection*, 625 F. Supp. 1553 (E.D. Wash. 1986); *Wong v. City of New York, Human Resources Administration*, 641 F.Supp. 588, 591 fn 2 (S.D. N.Y. 1986); and *O'Quinn v. Chambers County, Texas*, 636 F.Supp. 1388 (S.D. Texas 1986).

## II.

### Petitioners Cannot Convert This Legal Issue Into A Factual One.

Petitioners attempt to raise a factual claim of sufficient merit to upend the constitutionality of the 1985 FLSA Amendments. In support of this theory Petitioners submitted an affidavit of the named plaintiff (Petition, Appendix p. 21). In addition to serious questions as whether the intentions of a single individual conclusively establishes anything about other members of the class, or even raises an reference, it is apparent that Officer Rhinebarger's claim that he and his fellow officers arose the day after *Garcia* and chose to work overtime in sincere reliance on rights that were instantly afforded by the FLSA is patently absurd. As the affidavit of Colonel, now acting Superintendent Furnas (Petition, Appendix p. 24-26) indicates, the Indiana State Police operates on a semi-military model in a manner similar to most law enforcement agencies with, prior to *Garcia*, salaried officers who worked "overtime" at the direc-

tion of their superiors or in response to emergency situations. It borders on pure fantasy to assume that the "overtime" worked by Indiana State Troopers contained a substantial "voluntary" component which formed the basis for meaningful "reliance". Petitioners' claim also conjures up the silly and incorrect image of Indiana Troopers who return fire, give chase, or render assistance to accident or crime victims on occasions which unfortunately occur near shift changes, only as a result of a conscious and sincere reliance on getting paid time-and-a-half.[2]

This case was resolved by the District Court on cross motions for summary judgment. F.R.C.P. 56. It is apparent that summary judgment can be entered where a non-moving party has not buttressed his position with plausible, probative evidence.[3] Directed verdict practice generally mirrors the current summary judgment test. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 at 2510 (1986). Summary judgment should be granted if the pretrial evidence "is merely colorable" or "is not significantly probative". *Id.* 106 S.Ct. at 2511.

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[2] The Rhinebarger affidavit also makes reference to a teletype message sent out to the various police posts. (Petition, Appendix p. 22). This message (Petition, Appendix p. 23) was issued on October 17, 1985 in prompt response to Petitioners' letter of October 16, 1985 (Petition, Appendix p. 26-27) warning of possible threats and retaliation for filing the suit. Petitioners offer no explanation for how an October 17, 1985 memo supports "reliance" or "reasonable expectations" in a case where Petitioners seek damages for a period ending eleven days before Rhinebarger or any trooper could have received the memo.

[3] This Court has indicated in *Matsushita Electric Industrial Co. v. Zenith Radio Cor.*, 475 U.S. 574, 106 S.Ct. 1348 (1986):

"It follows from these settled principles that if the factual context renders respondents' [the motion's opponents'] claim implausible — if the claim is one that simply makes no economic sense — respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita*, 106 S.Ct. at 1356.

Petitioners' feeble efforts to create a significant factual issue must fail. Plaintiffs' transparent evidence offers woefully insufficient grounds to engraft a fact-sensitive test on consideration of the constitutionality of the 1985 FLSA Amendments, a statutory series born of the necessity of dealing with this Court's latest FLSA reversal.

## CONCLUSION

For the foregoing reasons, Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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